INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Federal Rules of Civil Procedure involved	3
Statement	5
Argument	7
Conclusion	13

CITATIONS

Cases:

Collins v. *Metro-Goldwyn Pictures Corporation*, 106 F. 2d 83	12
Comstock v. *Group of Institutional Investors*, 335 U. S. 211	12
Container Co. v. *Carpenter Container Corp.*, 9 F.R.D. 89	12
Crosby v. *Pacific S.S. Lines, Ltd.*, 133 F. 2d 470, certiorari denied, 319 U. S. 752	11
David v. *District of Columbia*, 187 F. 2d 204	8, 9
Flegenheimer v. *Manitoba Sugar Co., Ltd.*, 182 F. 2d 742	8
Frazier v. *United States*, 335 U. S. 497	11
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378	11
Kam Koon Wan v. *E. E. Black, Limited*, 182 F. 2d 146	8
Kaufman & Ruderman v. *Cohn & Rosenberger*, 177 F. 2d 849	10, 11
Shippers Pre-Cooling Service v. *Macks*, 181 F. 2d 510, certiorari denied, 340 U. S. 816	11
Society of European Stage Authors and Composers, Inc. v. *WCAU Broadcasting Co.*, 35 F. Supp. 460	12
Tyrrell v. *District of Columbia*, 243 U. S. 1	11
Vale v. *Bonnett*, C.A.D.C., June 7, 1951, 15 Fed. Rules Serv. 54b.4, case 6	8, 9, 10

Statutes:

Federal Rules of Civil Procedure, 28 U.S.C., following § 723c, as amended, 28 U.S.C., 1946 ed., Supp. IV, following § 2072:	
Rule 40	3, 11
Rule 42(b)	3, 11
Rule 54(b)	3, 7

Statutes—Continued

	Page
Rule 60(a)	4, 8
Rule 75(h)	4, 8
Trading with the Enemy Act, 40 Stat. 411, 419, as amended, 50 U.S.C. App. § 9(a)	5
Miscellaneous:	
Executive Order No. 9788, 11 F.R. 11981	5

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 148

REMINGTON RAND INC., PETITIONER

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. ETC. (I.G. CHEMIE) (INTERHANDEL)

and

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia wrote a memorandum opinion

(R. 26) which is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 400) is reported at 188 F. 2d 1011.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 29, 1951 (R. 403). The petition for a writ of certiorari was filed on June 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a judgment was final and appealable which dismissed a complaint of intervention on the merits after trial and did not dispose of the principal case between plaintiff and defendants, where the trial judge expressly directed that the judgment be entered and where the judge's express determination that there was no just reason for delay, pursuant to F.R.C.P. Rule 54(b), was made at the time of the entry of judgment but was entered of record by a *nunc pro tunc* order signed while the appeal was pending, an action which was in effect later ratified by the Court of Appeals.

2. Whether review may be sought in this Court of an order of the district court which required a separate and early trial of the issues raised by a complaint of intervention, where no objection was made in the district court and where the question was not raised in the court of appeals; and, if so, was it within the discretion of the district judge *sua sponte* to require a separate and early trial

of such issues in order to protect the subject matter of the suit from deterioration or loss and to protect the rights of all the parties.

3. Whether the two courts below erred in finding the facts concerning petitioner's alleged option to buy the General Aniline & Film stock.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The following Federal Rules of Civil Procedure are involved (28 U.S.C., following § 723c, as amended, 28 U.S.C., 1946 ed., Supp. IV, following § 2072):

Rule 40:

> Assignment of Cases for Trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 42(b):

> (b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 54(b):

> (b) Judgment Upon Multiple Claims. When more than one claim for relief is pre-

sented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 60(a):

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Rule 75(h):

(h) Power of Court to Correct or Modify Record. * * * If anything material to either party is omitted from the record on appeal by

error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

STATEMENT

The principal action out of which this proceeding arises was brought by Societe Internationale, etc. (I. G. Chemie), pursuant to Section 9(a) of the Trading with the Enemy Act (40 Stat. 411, 419, as amended, 50 U.S.C. App. § 9(a)). The complaint against the Attorney General [1] and the Treasurer of the United States, filed in October 1948, seeks the return, *inter alia*, of some 90% of the stock of General Aniline & Film Corporation (GAF) which had been vested by the Custodian as enemy property (R. 5-6).

On October 18, 1949, by leave of court, petitioner Remington Rand Inc. filed a complaint of intervention alleging that in 1947 it had acquired an option from I. G. Chemie to purchase on certain terms

[1] By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General, as his successor, and the Treasurer of the United States.

and conditions the vested GAF stock if and when I. G. Chemie prevailed in its suit against the Custodian for return of the stock (R. 2-5). Petitioner filed an amended complaint of intervention on April 17, 1950 (R. 5-8). The prayer was for a judgment declaring that petitioner was entitled to purchase the GAF stock under the terms and conditions of its alleged option agreement and that plaintiff I. G. Chemie be restrained and enjoined from disposing of any interest in said stock (R. 7).

On October 25, 1949, the Custodian moved for a declaratory judgment that defendants and plaintiff were entitled to settle the action regardless of any right which the intervenor had or asserted to the contrary (R. 393). The motion was denied on December 21, 1949 (R. 394). At the same time, the trial judge *sua sponte* and without objection set down for early determination the issues of fact and law raised by the complaint of intervention, with the stated purpose of protecting the subject matter of the action from deterioration or loss and protecting the rights of all the parties (R. 395-396, 409-410). After extended trial on those issues, the court found, *inter alia,* that no option contract existed and thus that the complaint of intervention was groundless on the merits (R. 30-37). A judgment dismissing the complaint of intervention was accordingly entered on April 26, 1950, upon the direction of the trial judge (R. 37-38). Notice of appeal was filed by petitioner on June 23, 1950. Upon

motion of I. G. Chemie (R. 408), the district court, by a *nunc pro tunc* order signed on January 4, 1951 (while the appeal to the court of appeals was pending but before it had been argued), ordered that its determination under F.R.C.P. Rule 54(b) that there was no just reason for delay, made prior to April 26, 1950, the time of the entry of the judgment, be formally entered of record as of that time (R. 413-414). The Court of Appeals for the District of Columbia Circuit (Circuit Judges Proctor, Edgerton and Fahy) affirmed the district court, holding, *inter alia,* (1) that the judgment of the district court was a final one and that the entry of the judgment was directed upon an express determination that there was no just reason for delay, and (2) that the findings of the trial court were abundantly supported by substantial evidence (R. 400-402).

ARGUMENT

1. In this case, the district court supplied a clerical omission in its record after the appeal was taken, by inserting into its judgment, *nunc pro tunc,* its earlier determination that there was no just reason for delay, in compliance with F.R.C.P. Rule 54(b) (*supra,* pp. 3-4). That the omission was clerical is not contested, and could not be, for the court, prior to the trial of petitioner's complaint in intervention, had expressed its views as to the desirability of expeditious disposition of petitioner's claim (R. 395-396, 409-410).

Petitioner's primary contention here (Pet. 12, 17-22) is that the district court was required to have leave of the court of appeals before it could make such a corrective order.[2]

The district court did not, in its order, specify the Rules authorizing its action. Two Rules, however, contain authority. Rule 60(a) (*supra*, p. 4) authorizes the district court to correct clerical omissions or mistakes in its judgment, and Rule 75(h) (*supra*, pp. 4-5) generally authorizes correction of the record on appeal. The two Rules differ somewhat in that the former requires leave of the appellate court, once the appeal has been docketed, and the latter does not. Both Rules contemplate what took place here—the filling in of material omitted or misstated by oversight. It is thus doubtful whether explicit leave of the court of appeals was required. If leave was required, however, it was tacitly granted by the decision of the court of appeals to hear and consider the appeal on the basis of the *nunc pro tunc* correction. Cf. *Vale* v. *Bonnett*, 15 Fed. Rules Serv. 54b.4, case 6, decided June 7, 1951 (C.A.D.C.).

---

[2] Inasmuch as the district court expressly directed the entry of the judgment and expressly determined that there was no just reason for delay, this case does not present the question whether, in the absence of such direction and determination, the dismissal of a third-party claim by the district court is final and appealable. All the courts of appeal which have passed upon the question have answered it in the negative. *David* v. *District of Columbia*, 187 F. 2d 204 (C.A.D.C.); *Flegenheimer* v. *Manitoba Sugar Co., Ltd.*, 182 F. 2d 742 (C.A. 2); *Kam Koon Wan* v. *E. E. Black, Limited*, 182 F. 2d 146 (C.A. 9).

The court below opened its opinion by writing that "This appeal is from a final judgment * * *. Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay" (R. 400). It was thus approving the validity of the entry as a means of perfecting the district court's judgment. The court has since stated, in another opinion on the same problem, that in considering the appeal in the instant case it "obviously held that Rule 54(b) had been sufficiently complied with." *Vale* v. *Bonnett, supra.*

The petitioner's contention reduces itself to frequent repetition of a charge that the court of appeals "assumed" that the judgment below was final and that the *nunc pro tunc* order was proper (Pet. 12, 19, 20, 21). The charge is wholly unfounded and is refuted by petitioner's admission that the question of the jurisdiction of the court of appeals was argued for "one solid hour" (Pet. 20, R. 399). Since petitioner attempts to go into the subjective question of the consideration given to this matter by the court of appeals, we recount for the benefit of this Court the circumstances of the oral hearing on this question. The question was not treated in any of the briefs below. It was only while the appeal was pending and after briefs had been filed that the decision in *David* v. *District of Columbia,* 187 F. 2d 204 (C.A.D.C.), called to the attention of the bar the problem of the determination required by Rule 54(b). On the opening of

oral argument, the court of appeals raised the question in this case, and all counsel, in turn, argued and discussed the matter, before the court went on to the argument on the merits. The argument as to Rule 54(b) was participated in by all the members of the bench with much interchange of remarks between the court and counsel, and ranged over many facets of the question. Frequent reference was made by the court and counsel to *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849 (C.A. 2). There the Court of Appeals for the Second Circuit decided an appeal on the merits and then stayed its hand for ten days in order to give the district court the opportunity to enter a *nunc pro tunc* express determination in compliance with Rule 54(b). That case was, of course, an instance of the grant of leave by the appellate court for the perfection of the judgment below, while the appeal was pending. In urging that case upon the court below in a case where the *nunc pro tunc* order had already been entered, counsel for I. G. Chemie and the Custodian were in effect asking that the court grant whatever leave was required. The decision, as we have shown above, was in favor of leave, after full argument was had.

Petitioner's position, stated without elaboration (Pet. 21-22), is apparently that the court of appeals had no alternative but to remand the case to the district court so that the correction might be made. The courts are not bound, either by reason or precedent, to take such meaningless steps. *Vale*

v. *Bonnett,* 15 Fed. Rules Serv. 54b.4, case 6, decided June 7, 1951 (C.A.D.C.). Cf. *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849, 850 (C.A. 2); *Crosby* v. *Pacific S.S. Lines, Ltd.,* 133 F. 2d 470 (C.A. 9), certiorari denied, 319 U.S. 752.

2. Another of petitioner's contentions (Pet. 9-11) is that the court below erred in that it approved the order of the trial judge for a separate and early trial of the issues raised by the complaint of intervention. Petitioner asserts that the order for a separate trial was improvident. We submit that since the order was not objected to in the district court and was not questioned in the court below, this point is not deserving of hearing by this Court. *Frazier* v. *United States,* 335 U.S. 497, 514; *Helvering* v. *Minnesota Tea Co.,* 296 U.S. 378, 380; *Tyrrell* v. *District of Columbia,* 243 U.S. 1, 5-6. In any event, it was clearly within the discretion of the trial court, under Rules 40 and 42(b) (*supra,* p. 3), to order a separate and early trial of the intervenor's claim. *Shippers Pre-Cooling Service* v. *Macks,* 181 F. 2d 510 (C.A. 5), certiorari denied, 340 U.S. 816. The court acted in its discretion in order to protect the property from deterioration or loss and to do the least possible injury to the conflicting interests of the three parties before it (R. 395-396, 409-410). This is especially so since the issues raised by the complaint of intervention involved a contract alleged to have been made by Remington Rand Inc. and I. G. Chemie in

1947, an issue distinct and conveniently separable from the issues of enemy taint and cloaking raised by the principal suit for the return of property vested under the Trading with the Enemy Act. Such situations warrant separate trials. *Collins* v. *Metro-Goldwyn Pictures Corporation,* 106 F. 2d 83, 87 (C.A. 2) (concurring opinion, Clark, C. J.); *Container Co.* v. *Carpenter Container Corp.,* 9 F.R.D. 89 (D. Del.); *Society of European Stage Authors and Composers, Inc.* v. *WCAU Broadcasting Co.,* 35 F. Supp. 460 (E.D. Pa.).

Petitioner sought to intervene in a suit for the return of vested property, claiming dealings with the plaintiff by which it allegedly got an interest in the vested property. It can hardly complain that its allegations were promptly put to trial.

3. Petitioner raises (Pet. 2-3), but does not argue, the question whether the trial court's findings as to the alleged option to purchase were clearly erroneous. The court of appeals held that these findings "are abundantly supported by substantial evidence" (R. 402), and under the established rule such concurrent findings of fact will not be reviewed here. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 213-214. Accordingly, it has now been authoritatively determined that petitioner has no right to intervene and is not entitled to the injunctive relief it demands.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HAROLD I. BAYNTON,
Assistant Attorney General.
JAMES D. HILL,
GEORGE B. SEARLS,
DAVID SCHWARTZ,
ANTHONY W. GROSS,
Attorneys.

JULY, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 959911 43